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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 816

JANE G. KELLY, Petitioner,

v.

AGNES J. REEVES GREER, MELLON NATIONAL BANK AND TRUST COMPANY, and PITTSBURGH NATIONAL BANK, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Where a United States Court of Appeals ordered judgments of dismissal to be vacated in certain actions in order to restore the District Court's power to enforce a Settlement Agreement and upon Plaintiff's assurance that she would go forward with the settlement if the cases were restored to active status, but, upon remand, Plaintiff refused to perform or to accept performance, demanding instead the right to claim damages for Defendant's alleged breach of the Settlement Agreement, did not the District Court have power summarily to order Plaintiff to go forward with the settlement?

II. Where the mandate of a Court of Appeals requires the entry of a certain order by a District Court, may the filing of a petition for certiorari to review the propriety of the mandated action be delayed until after such an order has been entered by the District Court and thereafter affirmed by the Court of Appeals as a proper compliance with its mandate, or must certiorari be sought within 90 days after the entry of the Court of Appeal's original order?

STATEMENT OF THE CASE

Plaintiff (Petitioner herein) seeks to set aside an Order of the United States District Court for the Western District of Pennsylvania, affirmed and reaffirmed by the Court of Appeals for the Third Circuit. The Order appealed from compels Plaintiff to go forward with a Settlement Agreement which will dispose of litigation which has been pending in federal and state courts in Pennsylvania, Ohio, Florida, Delaware and West Virginia. (I—47a; 108a; 52b-71b)[1]

Plaintiff complains that the Order appealed from deprives her of the right to substitute a claim for money damages for promised performance to which she is entitled under the Settlement Agreement. The history of these proceedings, however, demonstrates (a) that the Order of the court below was a proper exercise of its power summarily to compel parties to a pending lawsuit to carry out the terms of a Settlement Agreement entered into before the Court; (b) that the Order of the court below was itself a proper compliance with the mandate of the Court of Appeals which had issued after an earlier successful appeal by the Plaintiff in these proceedings; and (c) that the Order appealed from in no way interfered with any election of remedy open to Plaintiff. Plaintiff had no choice but to proceed with the Settlement Agreement, especially in view of her express assurances to the Court of Appeals that she

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1. References preceded by Roman Numeral I are to the appendices printed at the first appeal below; those preceded by Roman II are to the appendices printed at the second appeal. Both sets of appendices have been lodged with this Court by Petitioner.

would do so, in reliance upon which that Court had sustained Plaintiff's earlier appeal.

Plaintiff is the adult, married daughter of the individual Defendant, (Respondent herein). The basic controversy, which led to the commencement of a number of lawsuits in several states in the 1950's and early 1960's, grows out of the fact that certain property, including securities, had been registered in the name "Jane Greer" a name by which both mother and daughter have been known. The dispute between them concerns the ownership of such property. (I—28a-29a)

Two lawsuits involving these claims were commenced in 1959 and 1961, respectively, in the Western District of Pennsylvania, where certain of the property had been found in the possession of the two Banks which are named as Defendants in these proceedings.[2] In January 1963, after the two actions had been called for trial, Plaintiff and individual Defendant reached a settlement agreement. A stipulation outlining the settlement was read to the Court and, in accordance with its provisions, Plaintiff dismissed the basic actions with prejudice. (I—43a-51a)

The compromise contemplated not only settlement of the actions then pending in the Western District of Pennsylvania, but of the entire, broad, intra-family dis-

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2. Plaintiff is, and at all times material hereto has been, a citizen and resident of the State of Florida. Defendant is, and at all times material hereto has been, a citizen and resident of the State of West Virginia. Therefore, jurisdiction in the basic actions in the Western District of Pennsylvania was obtained under 28 U.S.C. 1655. (I—11b-13b)

pute. It provided for the transfer of various items of property, for the dismissal of all pending suits, and for the exchange of general releases; but the principal provision of the settlement involved the establishment of two trusts to which the individual Defendant was to transfer a large quantity of stock in two corporations. (I—43a-50a) The agreement provided that the Plaintiff should be the life beneficiary of the first of these trusts, with power in the Trustee to consume principal for her benefit and with a remainder in favor of her children. The individual Defendant was to be the life beneficiary of the second of the trusts, with power to consume principal during her lifetime, and with remainder to the Plaintiff's three sons by her first marriage. (I—44a-46a)

The Settlement Agreement called upon the attorneys for *both* parties by March 1, 1963 to prepare the Trust Indentures and other documents which implementation of the settlement required. The parties contemplated a closing under the Settlement Plan by May 1, 1963. (I—50a)

Soon after the settlement had been agreed to, disagreement arose concerning the settlement itself. Plaintiff's principal complaint against Defendant has been over the failure of the parties to effectuate the dismissal of an action pending in a state court in Florida,[3]

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3. That the Florida suit has not been dismissed is not the fault of this Defendant. As early as February 1963, this Defendant filed a motion asking the Florida Court to dismiss the action with prejudice at her cost. (I—53b) That motion would have permitted the entry of a dismissal in any form acceptable to the Court. The circumstances surrounding the dispute about the dis-

but she has also charged that in February or March of 1963, her mother told her that she did not intend to carry out the Settlement Agreement.[4]

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missal of the Florida action are detailed in Appellee's Appendix in the first appeal. (I—22b-23b) Even during the pendency of the ancillary proceedings, Defendant has indicated her continued willingness to assist in bringing about the dismissal of the Florida action, if Plaintiff would indicate her willingness to go forward with the Settlement Plan. (I—45b)

4. Contrary to the statement made in the Petition for Certiorari (p. 14, ftn. 9) Plaintiff's assertions respecting this conversation have been denied. (I—28b) Moreover, Plaintiff's claim that her mother made such statements in February or March 1963 loses all probative force in the face of the indisputable fact that at the end of March 1963, the Defendant furnished Plaintiff with copies of drafts of the various agreements needed to carry out the Settlement Plan and has repeatedly since solicited Plaintiff's cooperation to consummate the settlement. (I—39b-41b) Plaintiff's own counsel has conceded that Defendant and her counsel have *always* taken the position that the parties should go forward with the Settlement Agreement. (II—5b) Defendant's good faith in these efforts to carry out the settlement since January 22, 1963 is evidenced by the diligence with which she has undertaken the preliminary steps necessary to the accomplishment of the Settlement Plan which calls for the distribution of the great bulk of her extensive holdings. Her accountants and attorneys, acting pursuant to her instructions, have prepared the elaborate trust instruments and other documents needed to carry out the plan and have made accounting studies, prepared deeds, drawn releases, and have done the other things which the Settlement Plan contemplated. (I—33b) In contrast, Plaintiff has contributed nothing to these efforts; she has refused even to cooperate with Defendant's efforts. Although Plaintiff has complained that the draft trust agreements prepared

This has been denied by the Defendant, who insists that she has been at all times ready, willing and able to proceed with the settlement.

It is Defendant's position that Plaintiff became dissatisfied with the settlement, shortly after entering into it, because the bulk of the benefits therein provided for were to be held in trust and would not be subject to her control. Defendant has charged that Plaintiff has engaged in a calculated campaign to sabotage the settlement and to frustrate its purposes in order to substitute a claim for money damages for the mutual benefits which her mother expected to assure herself, her daughter and her grandchildren under the Settlement Plan. (I—19b-21b; 33b-37b)

In April 1963, Plaintiff filed what she designated as an "Ancillary Complaint," at the Term and Number of the actions in the Western District of Pennsylvania which she had dismissed with prejudice about six weeks earlier. In the "Ancillary" Complaint Plaintiff alleged that Defendant had repudiated the Settlement Agreement and demanded damages in the amount of $15,000,000.[5]

Defendant filed a responsive answer, vigorously denying that she was in default under the Settlement

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and submitted by Defendant are inconsistent with the Settlement Plan, she has refused to state the respects in which she believes the drafts should be changed. (I—34b; I—39b-45b)

5. In July 1963, after argument before the Court on the question of the Court's jurisdiction of the first "Ancillary" Complaint, Plaintiff filed a second "Ancillary" Complaint, in effect seeking a declaratory judgment. (I—59a-62a)

Agreement. Among other defenses, the Defendant challenged the Court's jurisdiction over her person because (a) she had never been served with process in the action except pursuant to 28 U.S.C. § 1655, and (b) because the principal actions had been dismissed with prejudice so that there was nothing then pending in the Court to which the Plaintiff's new Complaint could properly be said to be "ancillary." (I—17b-20b) The District Court held that it had no jurisdiction of the claims asserted in the "Ancillary Complaints," grounding its decision upon the fact that the principal actions had been dismissed with prejudice. (I—91a-95a) Plaintiff appealed. When the matter came on for oral argument before Judges McLaughlin, Kalodner and Staley, the Court expressed interest in the Defendant's assertions of her willingness to go forward with the Settlement Plan. (II—11b) In open court, the Court of Appeals explored the possibility of putting the Settlement Plan back on the track, inviting Plaintiff and Defendant to enter into an "ancillary" settlement, as it were, rather than to continue the dispute about whether the conduct of the mother had excused the daughter of her obligations to go forward with the Settlement Plan. (II—12b-13b) Counsel for Defendant had previously asserted his client's willingness to go forward with the Settlement Plan: After a momentary hesitation, counsel for Plaintiff[6] agreed that Plaintiff would also go forward with the settlement, if the proceedings should be restored to the status which they had had immediately before the entry of the judgments of dismissal in the principal actions. (II—15b) The Court of Appeals accepted these assur-

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6. Not her present counsel.

ances as "dispositive" of the appeal (II—15b) and thereafter entered its Order reversing the dismissals of the Ancillary Complaints. It remanded the proceedings to the District Court, with instructions to reinstate the actions to the "status quo existing . . . following the reading into the record of the Settlement Agreement but prior to the orders dismissing the actions." (II—6a-7a)

Notwithstanding the assurances which her counsel had given to the Court of Appeals, Plaintiff refused to go forward with the Settlement Plan. Accordingly, on April 14, 1965, the District Court entered an Order reciting its conclusion "that the parties are bound by the terms of the Settlement Stipulation read into the record on January 22, 1963"[7] and providing that they should begin to effectuate compliance with the Settlement Agreement in accordance with a time schedule

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7. Plaintiff treats this recital as a declaration by the District Court concerning the legal effect of the Agreement as of January 22, 1963 when it was entered into. (see Petition for Certiorari, p. 8, Ftn. 8) This is an incorrect interpretation of the Order. The Court's recital is that the *parties are* bound by the terms of the Agreement. The Order speaks as of its date, namely, April 14, 1965. Thus the Court at that time considered Plaintiff, as well as Defendant, to be bound by the terms of the stipulation. This is in effect a rejection of Plaintiff's contention that she was free to choose not to perform. The Order, thus, is not a declaratory judgment that the settlement stipulation imposed binding obligations when it was entered into; it is a formal rejection by the Court of the Plaintiff's claim that she was free to elect to rescind the obligation and to claim damages for Defendant's alleged breach. The Court's finding is supported by the record.

established in the Order. (II—54a-56a) On appeal, the Court of Appeals held that the Order of the District Court requiring the Plaintiff to go forward with the Settlement Plan was a proper interpretation of the Court of Appeal's mandate on the earlier appeal, and affirmed the Order. After rehearing, it reaffirmed the Order requiring Plaintiff to go forward with the settlement. It is this action which Plaintiff seeks to have this Court review.

ARGUMENT

Summary

The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals; and none of the other considerations justifying review on certiorari is present.

Plaintiff has not been compelled against her will to elect specific performance rather than the pursuit of her claim for money damages. At the oral argument on the first appeal, Plaintiff elected to go forward with the Settlement Plan. She obtained the benefits of her election in the form of a reversal of the District Court's earlier judgment and the remand of the proceedings to that Court. Plaintiff cannot now repudiate her choice and, at the same time, retain the benefits thereof.

This case presents a routine application of ordinary principles of waiver of breach; of election of remedy by Plaintiff's deliberate choice. It involves an ordinary illustration of the right of a Court summarily to enforce a settlement agreement made before it. The Order appealed from does not conflict with any constitutional or statutory right to a jury trial.

Finally, the application for certiorari is not timely. Plaintiff's basic complaint is with the decision of the Court of Appeals ordering that the proceedings be restored to the "status quo immediately after the settlement had been agreed to and before the basic actions had been dismissed". This Order was made in July 1964, in the first appeal. The Order of the District Court which is involved in the present proceedings was entered pursuant to the mandate of the Court of Appeals after the first appeal. The Petition for Writ of Certiorari is, there-

fore, an untimely attempt to have this Court review a decision of the Court of Appeals made more than two years before the Petition for Certiorari was filed.

I. None of the Considerations Which Make Appropriate Review on Writ of Certiorari Is Present in This Case.

There is not even a colorable conflict between the decision of the Court of Appeals for the Third Circuit which is sought to be reviewed and the decision of the Court of Appeals for the Fifth Circuit in *Kelly v. Greer*, 354 F.2d 209. The two decisions, rather than being in conflict, are entirely harmonious. All that the Court of Appeals for the Fifth Circuit has determined is that Plaintiff's rights under the Settlement Agreement must be definitively decided in the pending case in the Third Circuit. There is no conflict of any kind between the determinations of the two Courts.

Plaintiff's contention that she has been deprived of her constitutional or statutory right to a jury trial of her claim for damages requires more serious attention, but is likewise without merit.

The plain answer to Plaintiff's contention is that the choice of remedy was not made for her by the Court; she made the election herself. Plaintiff's argument ignores the crucial fact that the favorable outcome of her earlier appeal was the product of the assurances of her counsel to the Court that if the cause was remanded to the District Court, Plaintiff would go forward with the Settlement Agreement. Plaintiff is attempting to retain the benefits she derived from these assurances but to repudiate the condition on which they were given.

Argument.

The settlement agreed to before the District Judge on January 22, 1963 and again before the Court of Appeals at the oral argument on the earlier appeal may be summarily enforced, consistently with established law. *May v. LeClaire, et al.*, 78 U.S. 217 (1871); *Hullet, Inc. v. Universal C.I.T. Corp.*, (10th Cir. 1958) 259 F.2d 685; *All States Investors, Inc. v. Bankers Bond Co.*, (6th Cir. 1965) 343 F.2d 618, cert. den. 382 U.S. 830, rehearing den. 382 U.S. 922; *Main Line Theatres, Inc. v. Paramount Film Distrib. Corp.* (3rd Cir. 1962) 298 F.2d 801, cert. denied 370 U.S. 939; *Cummins Diesel Michigan, Inc. v. The Falcon,* (7th Cir. 1962) 305 F.2d 721; *Ingalls Iron Works Co. v. Ingalls et al.* (D.C.N.D. Ala. S.D. 1959) 177 F. Supp. 151, aff'd. 280 F2d 423.

As stated in *Cummins Diesel Michigan, Inc.*, at 305 F.2d 723:

> "Federal and state courts have held under a great variety of circumstances that a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be *summarily* enforced by the court." (Emphasis added)

This Court in *May v. LeClaire,* supra, recognized this principle, stating:

> ". . . According to the face of the proposition it involved the settlement of unadjusted demands on both sides. It was made in a spirit of peace and compromise, and was accepted in a corresponding spirit. It is the duty of a court of equity to uphold such an agreement, to protect and enforce the rights of both parties under it, and to carry it out as far as the facts, which subsequently occurred,

and the settled principles of our jurisprudence, will permit." (20 L.Ed. at p. 52)

In a case such as this, the Courts have broad equitable powers not only to enforce an agreement entered into before the Court, but also to make appropriate modifications therein, to adapt the agreement to the intentions of the parties, without their express consent. *English v. Cunningham,* (D.C. Cir. 1959) 269 F.2d 517, cert. den. 361 U.S. 897, 905, rehearing den. 361 U.S. 950; *U. S. v. Jacobs,* (4th Cir. 1961) 298 F.2d 469; *Leathers' Sons v. Goldman,* (6th Cir. 1958) 252 F.2d 188.

Nor should it be overlooked that the relief sought by Plaintiff required the opening of a judgment. The Court had the power to impose reasonable and just conditions on the granting of such relief. F.R.C.P. 60(b); *U. S. v. Gould,* (5th Cir. 1962) 301 F.2d 353; *Bridoux v. Eastern Air Lines, Inc.,* (D.C. Cir. 1954) 214 F.2d 207, cert. den. 348 U.S. 821. The Court of Appeals and the District Court were both justified in treating Plaintiff's conduct as evidencing her assent to an Order conditioned upon her going forward with the settlement.

The Order may also be sustained as an application of the rule of waiver of breach or election. *Acme Process Equipment Co. v. U. S.,* (Ct. of Claims 1965), 347 F.2d 509, cert. granted 384 U.S. 917; *Lichter v. Goss,* (7th Cir. 1956) 232 F.2d 715.

This case, while it involves an unusual fact situation and issues of importance to the parties, does not present an appropriate instance for the issuance of Writ of Certiorari, under the considerations by which the exercise of this Court's discretion is normally measured.

II. The Application for Certiorari Is Untimely.

The Order of the District Court entered on April 14, 1965 was entered in accordance with the mandate of the Court of Appeals for the Third Circuit, issued on September 21; 1964 pursuant to its Order of July 20, 1964. (II—37a) The Court of Appeals has held in the second appeal that the District Court correctly interpreted its mandate. *Kelly v. Greer,* 365 F.2d 669 at 672.

The Order of the District Court entered on April 14, 1965 involved a matter about which it had no discretion. *Ringhiser v. Chesapeake & Ohio Rwy. Co.,* (6th Cir. 1959) 264 F.2d 62. If any review by this Court was desired, certiorari should have been sought from the Order and Mandate of the Court of Appeals on the earlier appeal. *Metropolitan Water Co. v. Kaw Valley Drainage District,* (1912) 223 U.S. 519; *Texas & Pacific Rwy. Co. v. Anderson,* (1893) 149 U.S. 237; *Aspen Mining & Smelting Co. v. Billings* (1893) 150 U.S. 31.

In these circumstances, the present application for review on certiorari is out of time.

Respectfully submitted,

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